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**DONG YOUNG DIAMOND INDUSTRIAL CO., LTD,**

**AND DONGSOO LEE**

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CONTINENTAL D.I.A. DIAMOND  
PRODUCTS, INC., a California corporation,

Plaintiff/Counterclaim Defendant,

v.

DONG YOUNG DIAMOND INDUSTRIAL  
CO., LTD, a South Korean company, DONGSOO  
LEE, an individual, and DOES 1-10, inclusive,

Defendant/Counterclaim Plaintiff.

Case No. 08-cv-2136-SI

**ANSWER, AFFIRMATIVE  
DEFENSES, AND  
COUNTERCLAIMS OF  
DONG YOUNG DIAMOND  
INDUSTRIAL CO., LTD. AND  
DONGSOO LEE**

**JURY TRIAL DEMANDED**

Pursuant to Federal Rules of Civil Procedure 7, 8, 12, and 13, Defendant/Counterclaim Plaintiffs Dong Young Diamond Industrial Co., Ltd and Dongsoo Lee (collectively "Dong Young") submit this answer, affirmative defenses, and counterclaims in response to the

1 Complaint dated April 24, 2008 (the "Complaint") of Plaintiff/Counterclaim Defendant  
2 Continental D.I.A. Diamond Products, Inc. ("Continental").

3 **ANSWER**

4 Pursuant to Federal Rules of Civil Procedure 7, 8, and 12, Dong Young answers the  
5 Complaint of Continental as follows:

6 **THE PARTIES**

7 1. Dong Young is without knowledge or information sufficient to form a belief as to  
8 the truth of the allegations in paragraph 1 of the Complaint, and therefore denies the same.

9 2. Dong Young admits that it is a South Korean corporation having its principal  
10 place of business in Incheon, South Korea and that it is a global provider of diamond containing  
11 bits and blades for power tools for the stone, marble, granite and concrete-working trade. Dong  
12 Young denies all other allegations contained in paragraph 2 of the Complaint.

13 3. Dong Young admits that Mr. DongSoo Lee is a citizen of South Korea and is the  
14 president and owner of Dong Young. Dong Young denies all other allegations contained in  
15 paragraph 3 of the Complaint.

16 4. Dong Young is without knowledge or information sufficient to form a belief as to  
17 the truth of the allegations in paragraph 4 of the Complaint, and therefore denies the same.

18 5. Dong Young denies the allegations contained in paragraph 5 of the Complaint.

19 **JURISDICTION AND VENUE**

20 6. Dong Young denies the allegations in paragraph 6 of the Complaint, which call  
21 for a legal conclusion.

22 7. Dong Young denies the allegations contained in paragraph 7 of the Complaint.

23 8. Dong Young denies the allegations contained in paragraph 8 of the Complaint.

24 9. Dong Young denies the allegations contained in paragraph 9 of the Complaint.

25 10.(a) Dong Young admits the allegations contained in paragraph 10.(a) of the  
26 Complaint.

27 10.(b) Dong Young denies the allegations contained in paragraph 10.(b) of the  
28 Complaint.

1 10.(c) Dong Young denies the allegations contained in paragraph 10.(c) of the  
2 Complaint.

3 10.(d) Dong Young admits the allegations contained in paragraph 10.(d) of the  
4 Complaint.

5 11. Dong Young denies the allegations contained in paragraph 11 of the Complaint.

6 **GENERAL ALLEGATIONS**

7 12. Dong Young is without knowledge or information sufficient to form a belief as to  
8 the truth of the allegations in paragraph 12 of the Complaint, and therefore denies the same.  
9 Dong Young further denies the allegations to the extent they call for a legal conclusion.

10 13. Dong Young is without knowledge or information sufficient to form a belief as to  
11 the truth of the allegations in paragraph 13 of the Complaint, and therefore denies the same.  
12 Dong Young further denies the allegations to the extent they call for a legal conclusion.

13 14. Dong Young is without knowledge or information sufficient to form a belief as to  
14 the truth of the allegations in paragraph 14 of the Complaint, and therefore denies the same.  
15 Dong Young further denies the allegations to the extent they call for a legal conclusion.

16 15. Dong Young is without knowledge or information sufficient to form a belief as to  
17 the truth of the allegations in paragraph 15 of the Complaint, and therefore denies the same.

18 16. Dong Young is without knowledge or information sufficient to form a belief as to  
19 the truth of the allegations in paragraph 16 of the Complaint, and therefore denies the same.  
20 Dong Young further denies the allegations to the extent they call for a legal conclusion.

21 17. Dong Young is without knowledge or information sufficient to form a belief as to  
22 the truth of the allegations in paragraph 17 of the Complaint, and therefore denies the same.  
23 Dong Young further denies the allegations to the extent they call for a legal conclusion.

24 18. Dong Young is without knowledge or information sufficient to form a belief as to  
25 the truth of the allegations in paragraph 18 of the Complaint, and therefore denies the same.  
26 Dong Young further denies the allegations to the extent they call for a legal conclusion.

1           19.     Dong Young is without knowledge or information sufficient to form a belief as to  
2 the truth of the allegations in paragraph 19 of the Complaint, and therefore denies the same.

3 Dong Young further denies the allegations to the extent they call for a legal conclusion.

4           20.     Dong Young is without knowledge or information sufficient to form a belief as to  
5 the truth of the allegations in paragraph 20 of the Complaint, and therefore denies the same.

6 Dong Young further denies the allegations to the extent they call for a legal conclusion.

7           21.     Dong Young is without knowledge or information sufficient to form a belief as to  
8 the truth of the allegations in paragraph 21 of the Complaint, and therefore denies the same.

9 Dong Young further denies the allegations to the extent they call for a legal conclusion.

10          22.     Dong Young is without knowledge or information sufficient to form a belief as to  
11 the truth of the allegations in paragraph 22 of the Complaint, and therefore denies the same.

12 Dong Young further denies the allegations to the extent they call for a legal conclusion.

13          23.     Dong Young is without knowledge or information sufficient to form a belief as to  
14 the truth of the allegations in paragraph 23 of the Complaint, and therefore denies the same.

15          24.     Dong Young admits that on April 9, 2004, Continental and Dong Young entered  
16 into a manufacturing and license agreement (the "License Agreement") to manufacture certain  
17 diamond-containing stone-cutting products for Plaintiff and to apply certain Continental and  
18 Terminator Marks to such products. Dong Young denies all other allegations in paragraph 24 to  
19 the extent they call for a legal conclusion.

20          25.     Dong Young denies the allegations in paragraph 25 to the extent they call for a  
21 legal conclusion.

22          26.     Dong Young admits that the License Agreement contains the language quoted in  
23 paragraph 26 of the Complaint. Dong Young otherwise denies the allegations in paragraph 26 of  
24 the Complaint.

25          27.     Dong Young admits that the License Agreement contains the language quoted in  
26 paragraph 27 of the Complaint. Dong Young otherwise denies the allegations in paragraph 27 of  
27 the Complaint.

1           28.     Dong Young admits that it manufactured diamond-containing stone-cutting  
2 products for Continental and shipped such products bearing the Continental and Terminator  
3 Marks to Continental. Dong Young otherwise denies the allegations set forth in paragraph 28 of  
4 the Complaint.

5           29.     Dong Young denies the allegations in paragraph 29 of the Complaint.

6           30.     Dong Young denies the allegations in paragraph 30 of the Complaint.

7           31.     Dong Young denies the allegations in paragraph 31 of the Complaint.

8           32.     Dong Young denies the allegations in paragraph 32 of the Complaint.

9           33.     Dong Young denies the allegations in paragraph 33 of the Complaint.

10          34.     Dong Young denies the allegations in paragraph 34 of the Complaint.

11          35.     Dong Young admits that on or about September 28, 2007, Lee and Vincent  
12 Salemi met in Continental's offices in San Carlos, California. Dong Young otherwise denies the  
13 allegations in paragraph 35 of the Complaint.

14          36.     Dong Young admits that in or about November 2007, Lee and Vincent Salemi  
15 met again in Continental's offices in San Carlos, California. Dong Young otherwise denies the  
16 allegations in paragraph 36 of the Complaint.

17          37.     Dong Young denies the allegations in paragraph 37 of the Complaint.

18          38.     Dong Young denies the allegations in paragraph 38 of the Complaint.

19          39.     Dong Young denies the allegations in paragraph 39 of the Complaint.

20          40.     Dong Young denies the allegations in paragraph 40 of the Complaint.

21          41.     Dong Young denies the allegations in paragraph 41 of the Complaint.

22          42.     Dong Young denies the allegations in paragraph 42 of the Complaint.

23          43.     Dong Young denies the allegations in paragraph 43 of the Complaint.

24          44.     Dong Young denies the allegations in paragraph 44 of the Complaint.

25          45.     Dong Young denies the allegations in paragraph 45 of the Complaint.

26                   **COUNT I**

27          46.     Dong Young denies the allegations in paragraph 46 of the Complaint.

28          47.     Dong Young denies the allegations in paragraph 47 of the Complaint.

1 48. Dong Young denies the allegations in paragraph 48 of the Complaint.

2 49. Dong Young denies the allegations in paragraph 49 of the Complaint.

3 50. Dong Young denies the allegations in paragraph 50 of the Complaint.

4 51. Dong Young denies the allegations in paragraph 51 of the Complaint.

5 52. Dong Young denies the allegations in paragraph 52 of the Complaint.

6 53. Dong Young denies the allegations in paragraph 53 of the Complaint.

7 54. Dong Young denies the allegations in paragraph 54 of the Complaint.

8 55. Dong Young denies the allegations in paragraph 55 of the Complaint.

9 56. Dong Young denies the allegations in paragraph 56 of the Complaint.

10 57. Dong Young denies the allegations in paragraph 57 of the Complaint.

11 **COUNT II**

12 58. Dong Young denies the allegations in paragraph 58 of the Complaint.

13 59. Dong Young denies the allegations in paragraph 59 of the Complaint.

14 60. Dong Young denies the allegations in paragraph 60 of the Complaint.

15 61. Dong Young denies the allegations in paragraph 61 of the Complaint.

16 62. Dong Young denies the allegations in paragraph 62 of the Complaint.

17 63. Dong Young denies the allegations in paragraph 63 of the Complaint.

18 64. Dong Young denies the allegations in paragraph 64 of the Complaint.

19 65. Dong Young denies the allegations in paragraph 65 of the Complaint.

20 66. Dong Young denies the allegations in paragraph 66 of the Complaint.

21 67. Dong Young denies the allegations in paragraph 67 of the Complaint.

22 68. Dong Young denies the allegations in paragraph 68 of the Complaint.

23 69. Dong Young denies the allegations in paragraph 69 of the Complaint.

24 70. Dong Young denies the allegations in paragraph 70 of the Complaint.

25 **COUNT III**

26 71. Dong Young denies the allegations in paragraph 71 of the Complaint.

27 72. Dong Young denies the allegations in paragraph 72 of the Complaint.

28 73. Dong Young denies the allegations in paragraph 73 of the Complaint.

74. Dong Young denies the allegations in paragraph 74 of the Complaint.

75. Dong Young denies the allegations in paragraph 75 of the Complaint.

76. Dong Young denies the allegations in paragraph 76 of the Complaint.

77. Dong Young denies the allegations in paragraph 77 of the Complaint.

78. Dong Young denies the allegations in paragraph 78 of the Complaint.

79. Dong Young denies the allegations in paragraph 79 of the Complaint.

#### **COUNT IV**

80. Dong Young denies the allegations in paragraph 80 of the Complaint.

81. Dong Young denies the allegations in paragraph 81 of the Complaint.

82. Dong Young denies the allegations in paragraph 82 of the Complaint.

83. Dong Young denies the allegations in paragraph 83 of the Complaint.

84. Dong Young denies the allegations in paragraph 84 of the Complaint.

85. Dong Young denies the allegations in paragraph 85 of the Complaint.

86. Dong Young denies the allegations in paragraph 86 of the Complaint.

87. Dong Young denies the allegations in paragraph 87 of the Complaint.

#### **COUNT V**

88. Dong Young denies the allegations in paragraph 88 of the Complaint.

89. Dong Young denies the allegations in paragraph 89 of the Complaint.

90. Dong Young denies the allegations in paragraph 90 of the Complaint.

91. Dong Young denies the allegations in paragraph 91 of the Complaint.

92. Dong Young denies the allegations in paragraph 92 of the Complaint.

93. Dong Young denies the allegations in paragraph 93 of the Complaint.

94. Dong Young denies the allegations in paragraph 94 of the Complaint.

95. Dong Young denies the allegations in paragraph 95 of the Complaint.

#### **COUNT VI**

96. Dong Young denies the allegations in paragraph 96 of the Complaint.

97. Dong Young denies the allegations in paragraph 97 of the Complaint.

98. Dong Young denies the allegations in paragraph 98 of the Complaint.

99. Dong Young denies the allegations in paragraph 99 of the Complaint.
100. Dong Young denies the allegations in paragraph 100 of the Complaint.
101. Dong Young denies the allegations in paragraph 101 of the Complaint.

### **COUNT VII**

102. Dong Young denies the allegations in paragraph 102 of the Complaint.
103. Dong Young denies the allegations in paragraph 103 of the Complaint.
104. Dong Young denies the allegations in paragraph 104 of the Complaint.
105. Dong Young denies the allegations in paragraph 105 of the Complaint.
106. Dong Young denies the allegations in paragraph 106 of the Complaint.
107. Dong Young denies the allegations in paragraph 107 of the Complaint.

WHEREFORE, Dong Young respectfully requests that the Honorable Court enter a judgment in favor of Dong Young and against Continental, and award Dong Young its costs, reasonable attorney fees, and such other and further relief as the Court may find appropriate.

### **AFFIRMATIVE DEFENSES**

1. Continental's claims are barred for failure to state a claim upon which relief may be granted.
2. Continental's claims are barred by the doctrine of estoppel.
3. Continental's claims are barred, in whole or in part, by the applicable statute or statutes of limitations.
4. Continental's claims are barred on the ground of failure of consideration.
5. Continental's claims are barred by the equitable doctrine of waiver.
6. Continental's claims are barred by the doctrine of unclean hands.
7. Continental's claims are barred because any alleged damages the Plaintiff claims in this action are solely the result of its conduct and actions.
8. Continental's claims are barred by the statute of frauds.
9. Continental's claims are barred by its failure to mitigate its alleged damages.
10. Continental's claims are barred due to the voluntary consent of Continental.



1 11. Continental's claims are barred because Continental's alleged injury, if any, is the  
2 result, in whole or in part, of its own actions.

3 12. Continental's claims are barred by the doctrine of *in pari delicto*.

4 13. Continental's claims are barred as against public policy.

5 14. Continental's claims are barred by Continental's own breach of contract.

6 15. Continental's claims are barred on the ground of fraud.

7 16. Continental's claims are barred on the ground of preemption.

8 17. Continental's claims are barred by the California and U.S. Constitutions,  
9 including the First Amendment.

10 18. Continental's claims are barred because there is no threat of future harm sufficient  
11 to justify injunctive, declaratory, or other relief.

12 19. The License Agreement must be strictly construed against the Plaintiff because  
13 the Plaintiff drafted the document. To the extent there is any question or ambiguity as to  
14 enforceability or validity of any provision of the agreement, it must be construed against Plaintiff  
15 under the circumstances.

16 20. Continental's claims for injunctive relief are barred because of the availability of  
17 an adequate remedy at law.

18 21. Continental's claims are barred by the doctrine of good faith and fair dealing.

19 22. Continental's claims are barred because Dong Young's alleged acts or practices  
20 were not unlawful, fraudulent, or unfair.

21 23. Defendant is entitled to set off certain sums against the alleged damages claimed  
22 by Plaintiff.

23 24. Continental's unfair competition claim is preempted by the California Uniform  
24 Trade Secrets Act and/or other law.

25 25. Defendants reserve the right upon completion of their investigation and discovery  
26 to file any additional affirmative defenses, counterclaim, cross-claims and/or third-party  
27 complaints that may be appropriate.

28 WHEREFORE, Dong Young respectfully requests that the Honorable Court enter a

1 judgment in favor of Dong Young and against Continental, and award Dong Young its costs,  
2 reasonable attorney fees, and such other and further relief as the Court may find appropriate.

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## **COUNTERCLAIMS**

Pursuant to Federal Rule of Civil Procedure 13, Counterclaim Plaintiff Dong Young Diamond Industrial Co., Ltd and Dongsoo Lee (collectively “Dong Young”) counterclaims against Counterclaim Defendant Continental D.I.A. Diamond Products, Inc. (“Continental”) as follows:

### **THE PARTIES**

1. Defendant/Counterclaim Plaintiff Dong Young Diamond Industrial Co., Ltd. (“Dong Young”) is a South Korean company manufacturing professional diamond-containing tools such as core drills, saws, grinding wheels and polishing wheels used to process stone including marble and concrete.

2. Upon information and belief, Plaintiff/Counterclaim Defendant Continental D.I.A. Diamond Products Inc. (“Continental”), which is run by Vincent Salemi, is a California corporation which purchased the products manufactured by Dong Young Diamond and then sold them under its trademark of “TERMINATOR” in the US market (“Continental”).

### **GENERAL ALLEGATIONS**

#### **Continental’s Failure to Pay to Dong Young the Amounts Due**

3. Since around 1997, Dong Young has supplied cutting tools to Continental. Until 2007, Continental paid all invoices in accordance with the parties’ agreement that each invoice be paid in full within 60 days after the respective delivery date.

4. In accordance with orders placed by Continental, from July through September, 2007 Dong Young supplied to Continental certain products of which the total value amounted to \$393,515.80. These products included: (i) core drill bits valued at \$20,261.50 on July 7, 2007; (ii) core drill bits valued at \$36,201 on July 13, 2007; (iii) core drill bits valued at \$34,678.50 on July 21, 2007; (iv) blades valued at \$44,213.30 on July 27, 2007; (v) blades valued \$84,563 on August 10, 2007; core drill bits valued at \$47,110.50 on August 31, 2007; and finger bits valued at \$126,488 on September 15, 2007 (the “Products”).

5. Despite the parties’ prior agreement as to the timing of payment, Continental did not pay Dong Young for the Products within 60 days of delivery. Further, despite repeated

1 requests for payment by Dong Young, Continental to this date has failed to pay the amounts due  
2 for the Products, and instead has ceased all business transactions with Dong Young.

3 **Continental's Interference with Dong Young's Business Relations**  
4 **and Economic Advantage**

5 6. Upon information and belief, Dong Young learned that while also running its  
6 business selling diamond tools in the United States market, Continental established GM  
7 Diamond at 651-1 Munhyoung-ri, Opo-up, Gwangju-si, Gyeonggi-do, Korea ("GM Diamond").

8 7. Unlike Dong Young, whose primary products are cutting tools, GM Diamond  
9 initially manufactured mostly grinding and polishing tools. Upon information and belief,  
10 however, GM Diamond established a branch office at 2<sup>nd</sup> Floor, 246-46 Gojan-dong, Namdong-  
11 gu, Incheon, Korea on and about October 17, 2007. After establishing this branch office, GM  
12 Diamond started manufacturing cutting tools that are substantially similar to those manufactured  
13 by Dong Young. Upon information and belief, the principal office of GM Diamond was  
14 transferred to the location of the branch office and the two offices were integrated on April 1,  
15 2008.

16 8. Upon information and belief, at or around the time that GM Diamond established  
17 its branch office in October of 2007, GM Diamond hired several of Dong Young's key  
18 employees in Korea, including Young-Se Yoon, Nam-Hoon Song, Dong-Hyun Baek, and Tae-  
19 Jin Park. Upon information and belief, Continental and GM Diamond induced these key  
20 employees of Dong Young to work for GM Diamond in an effort to establish a Korean business  
21 that was directly competitive with Dong Young. Continental then ceased business relations with  
22 Dong Young after having been supplied the Products by Dong Young (for which Continental has  
23 failed to pay).

24 **FIRST CAUSE OF ACTION**

25 **(Breach of Contract)**

26 9. Dong Young repleads and incorporates herein by this reference the allegations set  
27 forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

28 10. Dong Young entered into a contract with Continental.

1 11. Dong Young performed under the contract.

2 12. Continental breached the contract.

3 13. As a direct and proximate result of Continental's breaches of contract, Dong  
4 Young has suffered damage.

5 14. Continental is liable to Dong Young for all amounts due under the Contract and  
6 all damages resulting from Continental's breaches of contract, including, without limitation,  
7 compensatory and consequential damages.

8 **SECOND CAUSE OF ACTION**

9 **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

10 15. Dong Young repleads and incorporates herein by this reference the allegations set  
11 forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

12 16. In addition to the covenants, conditions, and obligations imposed by the express  
13 terms of the License Agreement between Dong Young and Continental, there is an implied  
14 covenant in the Contract that Continental would refrain from doing any act that would have the  
15 effect of impairing or destroying Dong Young's right to receive the benefits of the Contract.

16 17. Dong Young did all, or substantially all, of the significant things that the Contract  
17 required it to do.

18 18. All conditions required for Continental's performance have occurred.

19 19. Continental unfairly interfered with Dong Young's right to receive the benefits of  
20 the Contract.

21 20. Dong Young was harmed by Continental's conduct.

22 21. Continental breached the implied covenant of good faith and fair dealing.

23 22. Continental's breach of the implied covenant of good faith and fair dealing has  
24 caused actual damage to Dong Young in an amount in excess of \$393,515.80. The full extent  
25 and amount of Dong Young's damages will be established at the time of trial.

26 23. Continental is liable to Dong Young for all damages resulting from Continental's  
27 breach of implied covenant of good faith and fair dealing.

**THIRD CAUSE OF ACTION**

**(Fraud [California Civil Code § 1572, *et seq.*] and Punitive Damages)**

24. Dong Young repleads and incorporates herein by this reference the allegations set forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

25. At times relevant hereto, Continental knowingly made false and misleading statements of material fact, concealed material facts, and/or made promises without the intent to perform the promises.

26. Continental intended for Dong Young to act on Continental's misrepresentations.

27. Dong Young actually relied on Continental's misrepresentations.

28. Dong Young's reliance was justifiable.

29. Continental's conduct was a substantial factor in causing damage to Dong Young.

30. As a result of Continental's knowing and false representations, and Dong Young's justifiable reliance thereon, Dong Young has suffered damages, for which it is entitled to full recovery, including, without limitation, loss of revenue, plus other compensatory and consequential damages. The full amount and extent of Dong Young's damages will be proven at trial.

31. Continental has committed actual fraud in violation of California Civil Code § 1572, *et seq.*, and/or other applicable statutory and common law.

32. Continental is liable to Dong Young for all damages resulting from Continental's fraud.

33. Continental is guilty of oppression, fraud, and/or malice, and Continental's intentional misrepresentations, deceit, and concealment of material facts were done with a willful and knowing disregard of the rights and interests of Dong Young, and with the intent to deprive Dong Young of property or otherwise to intentionally injure Dong Young, so as to justify an award of exemplary and punitive damages pursuant to California Civil Code § 3294 and/or other applicable law.

**FOURTH CAUSE OF ACTION**

**(Quantum Meruit/Quasi-Contract)**

34. Dong Young repleads and incorporates herein by this reference the allegations set forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

35. Dong Young rendered certain services for Continental at the request of Continental.

36. Continental knew about and consented to the services that Dong Young rendered.

37. Dong Young expected to receive payment for the services rendered.

38. Under the circumstances, it was reasonable for Dong Young to expect payment for the services rendered.

39. Continental has failed and/or refused to render payment to Dong Young for the services rendered.

40. Dong Young is entitled to recover the reasonable value of the services rendered and/or other relief from Continental under the doctrine of quantum meruit and/or quasi-contract.

**FIFTH CAUSE OF ACTION**

**(Promissory Estoppel)**

41. Dong Young repleads and incorporates herein by this reference the allegations set forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

42. Continental made clear and unambiguous promises that it should reasonably have realized would cause Dong Young to act and/or to forbear to its detriment, including, without limitation, promises to provide prompt payment to Dong Young for services rendered and products supplied.

43. Continental's promises actually induced Dong Young to act and to forbear to its detriment.

44. Dong Young's reliance on Continental's promises was both reasonable and foreseeable.

45. Dong Young suffered injury as a result of said reliance.

46. Continental's breach of its promises to Dong Young directly and proximately

1 caused injury to Dong Young.

2 47. Injustice can be avoided only by enforcement of Continental's promises.

3 48. Dong Young is entitled to recover the fair value of its services and/or other relief  
4 from Continental under the doctrine of promissory estoppel.

5 **SIXTH CAUSE OF ACTION**

6 **(Unjust Enrichment and Constructive Trust)**

7 49. Dong Young repleads and incorporates herein by this reference the allegations set  
8 forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

9 50. Dong Young conferred benefits on Continental.

10 51. Continental had an appreciation and/or knowledge of the benefits that Dong  
11 Young provided.

12 52. Continental has inequitably retained the benefits without payment to Dong  
13 Young.

14 53. Dong Young is entitled to recover the amount of the benefits that Continental  
15 realized and retained and/or other relief from Continental under the doctrine of unjust  
16 enrichment.

17 **SEVENTH CAUSE OF ACTION**

18 **(Intentional Interference with Prospective Economic Advantage and Punitive Damages)**

19 54. Dong Young repleads and incorporates herein by this reference the allegations set  
20 forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

21 55. Dong Young had certain economic relationships with a probability of future  
22 economic benefits.

23 56. Continental knew about Dong Young's economic relationships.

24 57. Continental engaged in conduct that was substantially certain to interfere with  
25 Dong Young's relationships.

26 58. Continental's conduct was independently unlawful.

27 59. Continental disrupted Dong Young's relationships.

28 60. Dong Young suffered actual injury as a direct and proximate result of



Continental's intentional interference with Dong Young's prospective economic advantage.

61. Continental is liable to Dong Young for intentionally interfering with Dong Young's prospective economic advantage, and Dong Young is entitled to full recovery from Continental with respect thereto.

62. Continental is guilty of oppression, fraud, and/or malice, and an award to Dong Young of exemplary and punitive damages is justified pursuant to California Civil Code § 3294 and/or other applicable law.

#### **EIGHTH CAUSE OF ACTION**

##### **(Negligent Interference with Economic Advantage)**

63. Dong Young repleads and incorporates herein by this reference the allegations set forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

64. Dong Young had economic relationships with a probability of future economic benefits.

65. Continental knew about Dong Young's economic relationships.

66. Continental knew or should have known that a failure to act with due care would disrupt Dong Young's relationships.

67. Continental's conduct was independently wrongful.

68. Continental disrupted Dong Young's relationships.

69. Dong Young suffered actual injury as a direct and proximate result of Continental's negligent interference with Dong Young's prospective economic advantage.

70. Continental is liable to Dong Young for negligently interfering with Dong Young's prospective economic advantage, and Dong Young is entitled to full recovery from Continental with respect thereto.

#### **NINTH CAUSE OF ACTION**

##### **(Accounting)**

71. Dong Young repleads and incorporates herein by this reference the allegations set forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

72. At times relevant hereto, there has been a relationship between Continental and

1 Dong Young and/or other circumstances that require an accounting in equity of all goods  
2 received by Continental and all amounts due to Dong Young.

3 73. An unknown balance is due from Continental to Dong Young that cannot be  
4 ascertained without an accounting, the means of which are within the knowledge of Continental.

5 74. Dong Young is entitled to a full and complete accounting from Continental.

6 **TENTH CAUSE OF ACTION**

7 **(Commercial Defamation)**

8 75. Dong Young repleads and incorporates herein by this reference the allegations set  
9 forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

10 76. Upon information and belief, Continental communicated derogatory and false  
11 statements concerning Dong Young's reputation to certain third parties.

12 77. Upon information and belief, the third parties understood the communication to  
13 be both derogatory and about Dong Young.

14 78. Continental cannot claim privilege.

15 79. Dong Young suffered harm as a direct and proximate cause of Continental's  
16 commercial defamation.

17 80. Continental is liable to Dong Young for commercial defamation, and Dong  
18 Young is entitled to full recovery with respect thereto.

19 **ELEVENTH CAUSE OF ACTION**

20 **(Trade Libel)**

21 81. Dong Young repleads and incorporates herein by this reference the allegations set  
22 forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

23 82. Upon information and belief, Continental published and communicated to certain  
24 third parties statements that disparaged Dong Young's services.

25 83. Upon information and belief, Continental's statements were reasonably  
26 understood to be statements of fact of and concerning Dong Young's services.

27 84. Continental's statements were false.

28 85. Continental published the statements with malice.

1 86. Continental's statements were not otherwise privileged.

2 87. The publication of Continental's statements directly and proximately caused  
3 Dong Young to suffer financial loss.

4 88. Continental is liable to Dong Young for trade libel, and Dong Young is entitled to  
5 full recovery with respect thereto.

6 **TWELFTH CAUSE OF ACTION**

7 **(Unfair Competition [California Business & Professions Code § 17200, *et seq.*])**

8 89. Dong Young repleads and incorporates herein by this reference the allegations set  
9 forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

10 90. At times relevant hereto, Continental engaged in business acts or practices that  
11 were unlawful, fraudulent, and/or unfair, in violation of California Business and Professions  
12 Code § 17200, *et seq.*, and/or other applicable statutory or common law.

13 91. Continental is liable to Dong Young for unfair competition, and Dong Young is  
14 entitled to full recovery with respect thereto, including, without limitation, the following  
15 remedies: (A) restitution of money lost through unfair competition; (B) injunctive relief; (C)  
16 additional preventative relief; and/or (D) declaratory relief.

17 **THIRTEENTH CAUSE OF ACTION**

18 **(Conversion/Trover)**

19 92. Dong Young repleads and incorporates herein by this reference the allegations set  
20 forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

21 93. Dong Young has ownership rights in, and/or rights to possession of, certain  
22 tangible or intangible property, including, without limitation, payments due to Dong Young from  
23 Continental.

24 94. Continental has converted Dong Young's property by wrongful acts and/or  
25 wrongful disposition of Dong Young's property rights.

26 95. As a direct and proximate cause of Continental's conversion, Dong Young has  
27 suffered damages for which it is entitled to full recovery from Continental.

28 96. Continental is liable to Dong Young for conversion.

**FOURTEENTH CAUSE OF ACTION**

**(Constructive Fraud [California Civil Code § 1573, *et seq.*])**

97. Dong Young repleads and incorporates herein by this reference the allegations set forth in each of the above paragraphs of this Counterclaim as though fully set forth herein.

98. Continental has committed breaches of duty by means of which, without actual or fraudulent intent, Continental gained advantage by misleading Dong Young to its prejudice.

99. In addition or in the alternative, Continental has committed acts and/or omissions that the law specially declares to be fraudulent, without respect to actual fraud.

100. Continental has committed constructive fraud in violation of California Civil Code § 1573, *et seq.*, and/or other applicable statutory or common law.

101. Continental is liable to Dong Young for all damages and other available relief as a result of Continental's constructive fraud.

**RELIEF REQUESTED**

WHEREFORE, Dong Young respectfully requests that the Court to award it relief including, without limitation, the following:

A. All actual, consequential, and incidental damages resulting from Continental's breach of contract;

B. All compensatory, incidental, and consequential damages proximately caused by Continental's tortious conduct;

C. Costs and attorney fees, including, without limitation, an award of costs and attorney fees pursuant to California Civil Code §§ 1021 and 1021.5, and/or other applicable legal authority;

D. Preliminary and permanent injunctive relief;

E. Statutory damages and penalties;

F. An award of exemplary and punitive damages for Continental's tortious conduct involving oppression, fraud, and/or actual or implied malice pursuant to California Civil Code § 3294 and/or other applicable law; and

1 G. An award of such other relief as the Court deems just and proper.

2  
3 DATED: June 26, 2008

4 By: /s/

5 Marc M. Gorelnik, Esq.  
6 TOWNSEND and TOWNSEND and CREW LLP

7 Alfred C. Frawley, Esq. (*pro hac vice*)  
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10 Attorneys for Defendants/Counterclaim Plaintiffs  
11 DONG YOUNG DIAMOND INDUSTRIAL CO., LTD,  
12 AND DONGSOO LEE  
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**JURY TRIAL DEMAND**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Defendants and Counterclaim Plaintiffs DONG YOUNG DIAMOND INDUSTRIAL CO., LTD, AND DONGSOO LEE demand a trial by jury on all issues triable of right by a jury.

DATED: June 26, 2008

By: /s/

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